TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1910~~ 1913

No. ~~378~~52.

A. WEBSTER RICHARDS, PLAINTIFF IN ERROR,

vs.

WASHINGTON TERMINAL COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 5, 1911.

(22,791)

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SUPREME COURT OF THE UNITED STATES

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No. 378.

A. WEBSTER RICHARDS, PLAINTIFF IN ERROR,

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WASHINGTON TERMINAL COMPANY.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 30, 1913.

MONDAY, *May 1st, A. D.* 1911.

No. 2248.

A. WEBSTER RICHARDS, Appellant,
vs.
WASHINGTON TERMINAL COMPANY, a Corporation.

The argument in the above entitled cause was commenced by Mr. H. H. Obear, attorney for the appellant, and was continued by Mr. J. W. Yerkes, attorney for the appellee.

TUESDAY, *May 2nd, A. D.* 1911.

No. 2248.

A. WEBSTER RICHARDS, Appellant,
vs.
WASHINGTON TERMINAL COMPANY, a Corporation.

The argument in the above entitled cause was continued by Mr. J. W. Yerkes, attorney for the appellee, and was concluded by Mr. H. F. Lerch, attorney for the appellant.

In the Court of Appeals of the District of Columbia.

No. 2248.

A. WEBSTER RICHARDS, Appellant,
vs.
WASHINGTON TERMINAL COMPANY, a Corporation.

It is stipulated by and between counsel for appellant and appellee in the cause that the sum of $4,000 at the bottom of page 8 of the printed transcript of record, being the present worth of the property, shall be changed to read $3,000, to conform to statement of agreed facts.

HUGH H. OBEAR,
Counsel for Appellant.
JOHN W. YERKES,
Counsel for Appellee.

(Endorsed:) No. 2248. A. Webster Richards, Appellant, vs. Washington Terminal Company, a Corporation. Stipulation. Court of Appeals, District of Columbia. Filed May 1, 1911. Henry W. Hodges, Clerk.

No. 2248.

A. WEBSTER RICHARDS, Appellant,
vs.
WASHINGTON TERMINAL COMPANY, a Corporation.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of the District upon a directed verdict for the defendant in an action by the plaintiff of trespass on the case for the recovery of damages incident to the moving and passing of locomotive engines and trains of cars over the right of way of the defendant, said right of way being separated from plaintiff's premises by other property.

Plaintiff, since March, 1901, has been the owner of lot 34, in square 693, through which square defendant's right of way extends. Upon this lot is a three-story brick dwelling house of ten rooms. These premises are about 114 feet distant from the south portal of defendant's tunnel, which enters and opens within said square, and about 90 feet distant from the tracks leading to and from that end of the tunnel. Between the defendant's right of way, occupied by these tracks, and the plaintiff's property are two other pieces of property; in other words, plaintiff's premises at no point abut said right of way.

The evidence of the plaintiff tended to show that by reason of the smoke, dust, dirt, cinders and gases emitted from defendant's trains while passing over said tracks and in and out of said tunnel, and by reason of the vibrations caused by the movement of said trains over said tracks and through said tunnel, his property which was formerly worth about $5,500 is now worth only about $3,000; that the rental value of said property has depreciated from the same cause $10 per month; that the depreciation in his personal property in said house has been about $600.

The tunnel and tracks leading to and from the south portal thereof, it is conceded were located, constructed and maintained under the authority of and in accordance with the acts of Congress of February 12, 1901, and February 28, 1903. The record also contains a stipulation "that no claim is made by the plaintiff that said tunnel and said tracks in square 693, and all trains operated therein and thereon, were constructed, operated or maintained in a negligent manner; and that said tunnel and said tracks were built upon property acquired by purchase or in condemnation proceedings, and that they were constructed under authority of the acts of Congress and permits issued by the Commissioners of the District of Columbia as aforesaid."

Upon the close of the plaintiff's case the defendant moved for a verdict, which motion being granted and judgment entered for the defendant the case was brought here.

It is apparent from what has been said that the issue in this case is sharply defined. The defendant, a public service corporation, is occupying in a lawful manner a right of way lawfully acquired.

The location of this right of way was fixed by law, and Congress has failed to enact any legislation under which plaintiff is entitled to damages for the injury he has sustained. The question, therefore, is whether there has been a taking of property within the meaning of the Fifth Amendment of the Constitution.

The physical proportions of plaintiff's premises have suffered no diminution on account of the acts forming the basis of this suit; in other words, the injury sustained is consequential and not direct. The Supreme Court of the United States has had this question before it in numerous cases.

In Pumpelly v. Green Bay Co., 13 Wall., 166, the question before the court was whether the permanent flooding of land by the erection of a dam authorized by law constituted a taking of private property for public use without just compensation within the meaning of the — State of Wisconsin. The court held that it did. In that case, it will be seen, there was an actual invasion of property and the result of such invasion was, as the court found, a practical taking thereof.

Transportation Company v. Chicago, 99 U. S., 635, was an action against the city of Chicago to recover damages sustained by the company by reason of the construction by the city of a tunnel under the Chicago River. The company owned a lot abutting on this river, upon which it had erected a dock and warehouse. In building the tunnel the city erected a coffer dam in front of plaintiff's dock, which, for the time being, deprived plaintiff of the use of its dock. The court said: "A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erection may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it." It was held that there had been no taking of plaintiff's property within the meaning of the constitution of the State.

In Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S., 317, the railroad company was authorized by law to enter the city of Washington with its railroad by one of two routes, and to construct all works which might "be necessary and expedient" in the proper completion and maintenance of its road. It selected the route along Virginia avenue in front of the church of the plaintiff and erected upon a parcel of ground immediately adjoining an engine house and machine shop, where a large number of locomotive engines were housed and fired and to and from which such engines were propelled, and in which they were repaired and otherwise used. This engine house contained sixteen smokestacks, lower in height than the windows of the main room of the church. The services in the church were habitually interrupted and disturbed by the noises of the workshop and the smoke, cinders, and dust issuing therefrom. The entrance to the church was frequently obstructed by locomotives standing on the branch track which extended to the

workshop and crossed the street in front of the church. The court found that this engine house and repair shop as they were used constituted a nuisance, for the maintenance of which the company was liable in damages to the plaintiff. Answering the claim of immunity advanced by the company, based upon the act of Congress, the court said: "In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others." The court observed that undoubtedly Congress might authorize a railway over the public highways of the District which, if used with reasonable care and produced "only that incidental inconvenience which unavoidably follows the additional occupation of the streets," might not be complained against by anyone; that the consequential annoyance which would necessarily follow from the running of cars with reasonable care over such a road would be *damnum absque injuria*. The court found, however, that the case under consideration differed from the supposed case and sustained the plaintiff's right to recover. In that case, it will be observed, the railroad company selected a route leading past a place of public worship. It then, as the court expressly found, needlessly erected and maintained at the very doors of the church an engine house and repair shop; in other words, its acts constituted an abuse of power and hence became a nuisance. In the present case no claim is made that defendant's tracks, tunnel, or trains were constructed or operated in a negligent manner.

In Merchant v. Pennsylvania R. Co., 153 U. S., 380, we have a case almost identical in its essential facts with the present case, and yet the Supreme Court of Pennsylvania found that the injury suffered by the plaintiff was consequential and did not constitute a taking, an injury, or a destruction of the plaintiff's property under the laws and constitution of that State. While the precise question here involved was not passed upon by the Supreme Court of the United States, the court incidentally pointed out the difference between injuries resulting from the construction of a railroad on the street on which property abuts and "the injuries consequential on the operation of the railroad as situated on the defendant's own property." The court said: "The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude them from the use of their accustomed highway, and the other class suffered damages which were consequential on the use by the defendant company of their franchise on their own property."

In United States v. Lynah, 188 U. S., 445, the court found that there had been an actual appropriation and invasion of plaintiff's land as distinguished from consequential damage, and hence that such land had been taken within the meaning of the Constitution.

Dana v. Rock Creek Railway Co., 7 App., D. C., 482, is not in point. That case is simply an affirmance of the proposition that the owner of land abutting on a public street has an easement of access

over said street which may not be destroyed or impaired by a railway company or other corporation using the street for its own purposes without compensation to such owner. The rule has its source in the trust upon which streets are held, which is that they shall be devoted to the use of public travel. When, therefore, they or a substantial part of them are attempted to be appropriated by a private transportation corporation to the injury of abutting owners, such use becomes a perversion of the street and imposes upon it an additional servitude. See Muhlker v. N. Y. & Harlem R. Co., 197 U. S., 544; Sauer v. City of New York, 206 U. S., 536.

Nor is the case of Academy of the Sacred Heart v. Phil., Balt. & Washington R. Co., present term (39 Wash. Law Rep., 153), like the present case in its facts. The evidence in that case tended to show an unreasonable and negligent use of its property by the railway company. Moreover, the question here under consideration was not there suggested or considered.

While some of the State decisions make no distinction between consequential injuries to property incident to the proper operation of a railroad and an actual invasion or physical taking of such property, the Supreme Court of the United States, as we read its decisions, has clearly made such a distinction. The cases in which this distinction has been made are cited in United States v. Grizzard et al., decided January 3, 1911, by the Supreme Court of the United States. Many of the States, appreciating the injustice liable to result from this rule, have amended their constitutions so as to cover injuries thus sustained. We take the law in the present case, however, as we find it and we see no escape from the conclusion that plaintiff's property has not been taken within the meaning of the Constitution.

The judgment is therefore affirmed, with costs.

Affirmed.

WEDNESDAY, *May 24th, A. D.* 1911.

No. 2248, April Term, 1911.

A. WEBSTER RICHARDS, Appellant,
vs.
WASHINGTON TERMINAL COMPANY, a Corporation.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE ROBB,
May 24, 1911.

THURSDAY, *June 1st, A. D.* 1911.

No. 2248.

A. WEBSTER RICHARDS, Appellant,
vs.
WASHINGTON TERMINAL COMPANY, a Corporation.

On motion of Mr. H. H. Obear, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between A. Webster Richards, Appellant, and Washington Terminal Company, a Corporation, Appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 1st day of June, in the year of our Lord one thousand nine hundred and eleven.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—
—— ——.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, A. Webster Richards, as principal, and The Fidelity & Deposit Company of Baltimore, as surety, are held and firmly bound unto Washington Terminal Company in the full and just sum of Three Hundred Dollars ($300)

to be paid to the said Washington Terminal Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 5th day of June, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between A. Webster Richards and Washington Terminal Company a judgment was rendered against the said A. Webster Richards and the said A. Webster Richards having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Washington Terminal Company citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if he the said A. Webster Richards shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

A. WEBSTER RICHARDS. [SEAL.]

(Seal of Fidelity & Deposit Co.)

FIDELITY & DEPOSIT COMPANY
OF MARYLAND, [SEAL.]
By J. SPRIGG POOLE, [SEAL.]
Attorney in Fact.

Sealed and delivered in the presence of—

G. L. BAKER.

Approved by—

CHAS. H. ROBB,
Associate Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2248. A. Webster Richards, Appellant, vs. Washington Terminal Company, a Corporation. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 12, 1911. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Washington Terminal Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein A. Webster Richards, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered

against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 12th day of June, in the year of our Lord one thousand nine hundred and eleven.

CHAS. H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 12th day of June, A. D. 1911.

WASHINGTON TERMINAL CO.,
By JOHN W. YERKES, *Att'y.*

[Endorsed:] Court of Appeals District of Columbia. Filed Jun 12, 1911. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to — inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of A. Webster Richards, Appellant, vs. Washington Terminal Company, a Corporation, No. 2248, April Term, 1911, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 13th day of June A. D. 1911.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

In the Supreme Court of the United States, October Term, 1911.

No. 715.

A. WEBSTER RICHARDS, Plaintiff in Error,
vs.
WASHINGTON TERMINAL COMPANY, a Corporation, Defendant in Error.

Assignment of Errors.

1. The Court below erred in affirming the action of the trial court directing a verdict for the defendant.

2. The Court below erred in affirming the action of the trial

court holding that the plaintiff was not entitled to recover from the defendant for the damage proved.

3. The Court below erred in affirming the action of the trial court holding that the damage to plaintiff's property was not a taking without just compensation and in controvention of the Fifth Amendment to the Constitution of the United States.

GIBBS L. BAKER,
Counsel for Plaintiff in Error.

[Endorsed:] 715/22791.

[Endorsed:] File No. 22791. Supreme Court U. S., October Term, 1911. Term No. 715. A. Webster Richards, Pl'ff in Error, vs. Washington Terminal Co. Assignment of Errors. Filed August 31, 1911.

Endorsed on cover: File No. 22,791. District of Columbia Court of Appeals. Term No. 378. A. Webster Richards, plaintiff in error, vs. Washington Terminal Company. Filed July 5, 1911. File No. 22,791.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 52.

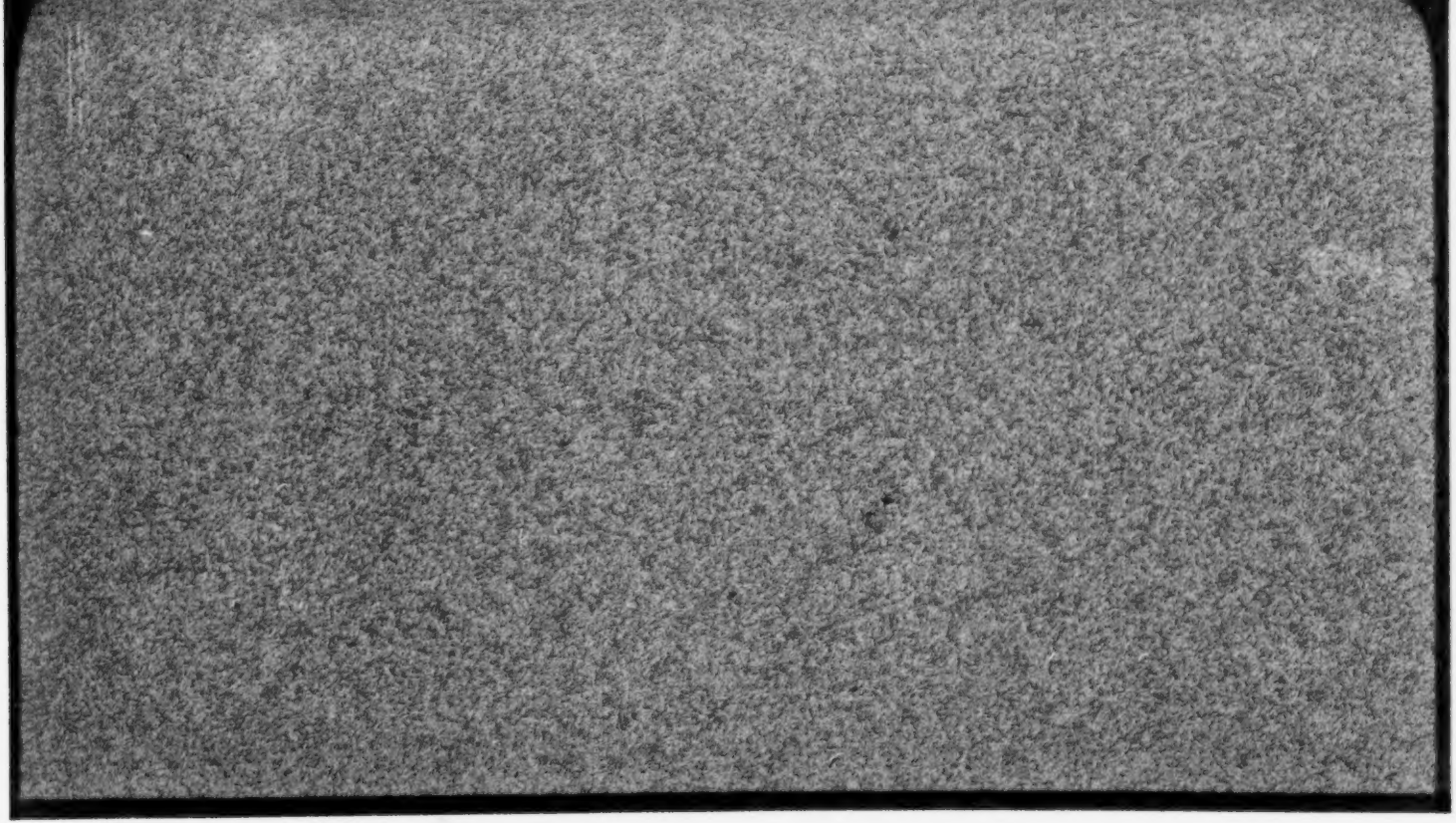
A. WEBSTER RICHARDS, PLAINTIFF IN ERROR,

vs.

WASHINGTON TERMINAL COMPANY, A CORPORATION.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES A. DOUGLAS,
THOMAS RUFFIN,
EDW. F. COLLADAY,
PAUL SLEMAN,
HARRY F. LERCH,
HUGH H. OBEAR,
Attorneys for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 52.

A. WEBSTER RICHARDS, PLAINTIFF IN ERROR,

vs.

WASHINGTON TERMINAL COMPANY, A CORPORATION.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

The plaintiff in error, plaintiff below, filed this suit in the Supreme Court of the District of Columbia to recover damages for alleged injury to his property caused by the maintenance of a private nuisance by the defendant in error upon its own property near that of plaintiff.

Upon conclusion of the plaintiff's evidence the trial court directed the jury to find a verdict for the defendant. Upon appeal to the Court of Appeals that judgment was affirmed. From that judgment a writ of error has been brought to this court.

The nuisance proved was that great volumes of gas, smoke, soot, cinders, and dirt were emitted by defendant's trains passing through the tunnel known as the First Street tunnel, and driven from the mouth of said tunnel by means of a fanning system in the tunnel, over and upon the property

of the plaintiff adjacent thereto, thereby rendering plaintiff's house almost uninhabitable and depreciating the value of the property over $2,500. This depreciation was about 50 per cent. of the total value of the property (R., 8-9).

An agreed statement of facts constitutes the bill of exceptions. This agreed statement is set forth at pages 7, 8, and 9 of the record, and from it the following facts appear:

The plaintiff is the owner of lot number 34 in square 693 in Washington, having a frontage of twenty feet on New Jersey avenue and an average depth of eighty-one feet. The lot is improved by a three-story brick dwelling-house containing ten rooms. He has been the owner of this property since the 11th of March, 1901, and from that time until the first day of April, 1907, the house was occupied by tenants, who paid to the plaintiff a monthly rental of $30.50. From April, 1907, until January, 1908, the house remained vacant, plaintiff being unable to secure a tenant therefor; and in January, 1908, he occupied the premises himself, and has done so from that time until the present (R., 7).

The defendant is the owner of the tunnel leading to the Union Station, known as the First Street tunnel, and of the tracks therein. The south portal of the tunnel opens within and near the northeasterly corner of square 693 and the tracks extend therefrom in a southwesterly direction through square 693. The defendant, the Washington Terminal Company, is the owner of said tunnel, and the tracks therein, but said ownership ceases at the south portal of said tunnel, though the movement of all trains operated upon the tracks beyond and without the south portal of the tunnel is controlled by the defendant Washington Terminal Company (R., 8-9). Plaintiff's house faces on the west side of New Jersey avenue southeast, and the rear windows of all the floors of the house open in the direction of defendant's tunnel and the railroad tracks leading therefrom. Between the right of way covered by the tracks and plaintiff's property are two lots, one having a frontage of about 25 feet, and

the other of about 19 feet. Plaintiff's house is about 114 feet distant from the south portal of the tunnel and about 90 feet distant at the nearest point from the tracks leading from said tunnel.

There are two sets of railroad tracks in the tunnel and leading from it.

There were several houses built upon and near the northeasterly corner of square 693, about the point where the mouth or part of the tunnel is now located, which were torn down by the defendant or its agents for the purpose of construction of the tunnel and tracks.

The tunnel and tracks located therein and leading therefrom are used for the passage of trains both north and south and about thirty passenger trains pass over the tracks and through the tunnel in the course of each day. Many of the trains stop at a switch tower which is situated just at the mouth of the tunnel and in the center of square 693 (R., 8). Plaintiff's property has been damaged by volumes of dense black or gray smoke emitted from the trains while passing through the tunnel or standing on the tracks near the signal tower. *There is a fanning system installed in the tunnel which causes the gases, cinders, and smoke from the engines to be blown out from the tunnel and over and upon the premises of the plaintiff.* And the gases, cinders, and smoke contaminate the air and add to the inconvenience suffered by the plaintiff in the occupation of his property (R., 8).

Prior to the construction of the tunnel and the operation of trains plaintiff's house was pleasant and comfortable, but since trains were operated through the tunnel the property has accordingly depreciated in value, and plaintiff has been unable to rent his property and has been forced to occupy it himself (R., 8). The property has depreciated in value $2,500, the rental value has depreciated from $30 a month to $20 a month, and the personal property in the house, consisting of furniture and personal belongings, has been damaged to the extent of $600. All this depreciation has

been caused by the presence of smoke, cinders, and gases emitted from the trains passing on the tracks and coming from the mouth of the tunnel. The dwelling-house has also been damaged by vibrations caused by the movement of the trains upon the tracks or in the tunnel, resulting in the cracking of the walls and wall paper, breaking glass in windows and disturbing the peace and comfort of the occupants of the house.

The tunnel was located and constructed under authority of the acts of Congress, February 12, 1901, and February 28, 1903, in accordance with plans and specifications approved by those acts. There is no claim made by the plaintiff for negligence of the defendant in the construction, operation or maintenance of the trains or tunnel (R., 9).

Assignment of Errors.

1. The court below erred in affirming the action of the trial court directing a verdict for the defendant.

2. The court below erred in affirming the action of the trial court holding that the plaintiff was not entitled to recover from the defendant for the damage proved.

3. The court below erred in affirming the action of the trial court holding that the damage to plaintiff's property was not a taking without just compensation and in contravention of the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

The only defense interposed by the Terminal Company was the act of Congress under which authority the tunnel in question was built and the tracks laid. It was claimed that this authority granted immunity to the defendant.

It will be seen, therefore, that the issue here is narrow and well defined. Can defendant justify its private nuisance by pleading legislative authority to construct its works?

There can be no question that defendant's acts constitute a private nuisance.

Alfred's case, 9 Coke's Rep., 57.
Crump *vs.* Lambert, L. R., 3 Eq., 305.
B. & P. R. R. Co. *vs.* Fifth Baptist Church, 108 U. S., 317.
Canfield *vs.* United States, 167 U. S., 518.

There is no question that the damage sustained by Richards is substantial. The property depreciated in value from $5,500 to $3,000; the rental value from $30 per month to $20 per month; the personal property from $1,200 to $600; all by reason of the acts of defendant complained of (R., 8, 9, 15).

So that we have here a private nuisance, causing special, direct, and substantial injury to neighboring property, and it is attempted to justify this nuisance upon the theory that Congress having authorized the railroad to be located at this particular point, in the absence of negligence in the operation of trains through the tunnel, no liability exists, even though a private nuisance does result, which causes special, direct, and substantial injury to the property of another. We contend that the act of Congress under which defendant attempts to justify did not intend to grant immunity to the defendant from the claims of private owners who sustain

direct and substantial damage, and that it could not have granted such immunity even had it so intended.

The inquiry therefore is:

(1) Can Congress authorize or legalize a private nuisance such as is presented here? and

(2) Has it done so in this case?

It seems to us that these questions are settled by Baltimore & Potomac Railroad Company *vs.* Fifth Baptist Church, 108 U. S., 317.

In this case the Baltimore & Potomac Railroad Company was authorized to lay its tracks within the limits of the city of Washington, and construct other works necessary and expedient for the proper completion and maintenance of its road. Pursuant to this authority, defendant erected an engine house and machine shop in a parcel of land immediately adjoining the church of the plaintiff. The use of this roundhouse by the defendant caused great annoyance and inconvenience, noise, smoke, soot, cinders, etc., to the plaintiff. The jury found the damage to the plaintiff to be $4,500. The evidence showed that the work carried on was carefully done; that the appliances used were the best for the purpose; that the engine house and smokestacks were carefully and skilfully constructed; that there was no negligence in construction or operation of the plant.

The chief reliance of defendant was the authority conferred upon it by the act of Congress.

This court said:

> "It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skilfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit.

"In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road, did not authorize it to place them wher ever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city.

"Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and *with immunity for their invasion*. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.

"Undoubtedly, a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential *annoyance* may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private *inconvenience* in such case must be suffered for the public accommodation.

"But the case at bar is not of that nature. It is a case of the use by the railroad company of *its* property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship. It admits, indeed, of grave doubt whether Congress could authorize the company to occupy and

use any premises within the city limits in a way which would subject others to physical discomforts and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance.

"The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

* * * * * * *

"If, as asserted by the defendant, the noise, smoke and odors, which are the cause of the discomfort and annoyance to the plaintiff, are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine-house and workshop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and, if it be not possible, they should be removed to some other place where, by their use, the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city, sufficiently distant from the church to avoid all cause of complaint, and

yet sufficiently near the station of the company to answer its purposes.

"There are many lawful and necessary occupations which, by the odors they engender, or the noise they create, are nuisances when carried on in the heart of a city, such as the slaughtering of cattle, the training of tallow, the burning of lime, and the like. Their presence near one's dwelling-house would often render it unfit for habitation. It is a wise police regulation, essential to the health and comfort of the inhabitants of a city that they should be carried on outside of its limits. Slaughter-houses, lime kilns and tallow furnaces are, therefore, generally removed from the occupied parts of a city, or located beyond its limits. No permission given to conduct such an occupation within the limits of a city would exempt the parties from liability for damages occasioned to others, however carefully they might conduct their business. Fish *vs.* Dodge, 4 Den., 312.

"The fact that the smoke-stacks of the engine-house were as high as the city regulations for chimneys required, is no answer to the action, if the stacks were too low to keep the smoke out of the plaintiff's church. In requiring that chimneys should have a certain height, the regulations did not prohibit their being made higher, nor could they release from liability if not made high enough. It is an actionable nuisance to build one's chimneys so low as to cause the smoke to enter his neighbor's house. If any adjudication is wanted for a rule so obvious, it will be found in the cases of Sampson *vs.* Smith, 8 Sim., 272, and Whitney *vs.* Bartholomew, 21 Ct., 213."

In this case it will be seen that this court has expressly defined the acts that a legislature may authorize which, without such authorization, would constitute nuisances. This is the very essence of the decision. The court uses this language:

> *"The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The*

legislative authorization exempts only from liability to suit, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

Is not this good law, and if it is, does it not apply in its entirety to the facts of the case at bar? Beyond question Richards suffered a special inconvenience and discomfort not experienced by the public at large. The authorization to the Terminal Company does not affect a public highway or a public stream. And surely the Washington Terminal Company stands upon the same plane with respect to public interest and public control as did the Philadelphia, Baltimore & Washington Railroad Company.

From this statement of the law and from the facts as applicable thereto, should it not be said that Congress had no *power* to grant immunity to the Terminal Company from suit by an individual for a private nuisance?

No Intention to Grant Immunity.

Even assuming that the foregoing proposition is not sound, the Terminal Company must still respond in damages to Richards if it be found that Congress did not intend to grant immunity to them from suits for private nuisances, and this construction, we contend, is the only one that reasonably can be given under all the circumstances of this case.

Did Congress intend to legalize this private nuisance and grant immunity to this private railroad corporation from a suit by an individual suffering a special damage?

The fundamental error, it seems to us, in the decision of the Court of Appeals and in the position of our opponents, is that it assumes that the authority to construct the works in question impliedly carried with it immunity from liability. While on the other hand, we contend that the only proper construction to be placed upon the act is that it is

accompanied by *the implied qualification* that damages should be paid to those who suffer special and peculiar injury by reason of the maintenance of any private nuisance.

This court holds in the Fifth Baptist Church case, *supra*, that the grant to the Pennsylvania Railroad Company was accompanied by "the implied qualification that the works should not be so placed as by their use unreasonably to interfere with and disturb the peaceful and comfortable enjoyment of others in their property." The basis of that statement is that Congress does not intend to grant immunity to private corporations from liability for private nuisances.

And, if that be true, is it not fair to assume that if the corporation had to put its works at a particular place the implied qualification would be that it has to pay such damages as are caused by the maintenance of any private nuisance? It is not only reasonable, but it is the most obvious principle of common justice. What possible reason can be advanced for insisting that Congress intended that Richards should bear the burden of a private nuisance by this railroad corporation merely because Congress directed the railroad company to erect their works at a particular place?

But the conclusion becomes even stronger when we consider the following quotation from the Fifth Baptist Church case:

> "Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, *and with immunity for their invasion.*"

And is that not all that the Washington Terminal Company has in this case? A grant, license, or privilege to erect its works. In the face of that language from this court, can it be said that this act imports immunity?

> "The great principle of the common law, which is equally a teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred."

Surely it was not the intention of Congress that one-half of the value of this man's property should be destroyed by this railroad company without compensation; surely nothing but express and unequivocal language in the act itself could justify this court in reaching that conclusion.

But the defendant says that immunity from suit is to be inferred because Congress *"authorized and directed"* the works to be erected at this very place.

They admitted below that if no designation of the particular square and lines of right of way had been made by Congress their nuisance would be actionable, under the Fifth Baptist Church case, but endeavored to escape liability on the distinction suggested above.

Is this distinction sound in principle?

In support of their position they rely upon this language in the Fifth Baptist Church case:

> *"It admits indeed of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits in any way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances."*

We submit that the grave doubt should be resolved in favor of this plaintiff. And if it admits of grave doubt whether Congress *could* do it, does it not admit of even graver doubt whether Congress *intended* to do it?

If Congress could not give the railroad company immunity by authorizing them to extend the road or works *anywhere in the city of Washington*, how can the legislative authority be broadened in its scope merely by reason of a restriction in its grant to the railroad company? How can it seriously be contended that this restriction to the railroad company can be construed to grant immunity from a suit of this character for damages?

Instead of authorizing the railroad company, broadly, to lay its tracks and construct its works anywhere in the city of Washington, Congress authorized and directed them to construct their tracks through certain specified squares. Suppose, instead of saying "anywhere in the District of Columbia," Congress had authorized the railroad company to run their tracks in any particular part—as, for instance, southeast Washington—and the railroad company, pursuant to the authority, had constructed its works and maintained its nuisance right at Richards' very door, would not Richards be entitled to recover under the Fifth Baptist Church case? Suppose the authority had been limited to half a dozen squares in southeast Washington, would he still not be entitled to recovery? How, then, can the fact of a further restriction affect the underlying principle? We contend that it does not, because Congress impliedly coupled with this grant the condition that the railroad company should pay the damages to any one suffering from the existence and continuance by it of a private nuisance.

Plaintiff in error had for a number of years been the owner of the premises in question, receiving therefor a reasonable rental on the value of his property. A private corporation, organized and existing for private gain, is authorized and directed by Congress to extend its tracks diagonally through the center of the city block in which plaintiff's house is located and at the corner of and within said block to construct the mouth of a tunnel, which is to run underneath the city to the new Union station. Certain property in the block is acquired by the railroad company for its right of way by condemnation. The property of plaintiff in error, while not physically taken by the railroad company for right of way purposes, is rendered practically uninhabitable by reason of the erection of said tunnel and the operation of the fanning system in connection therewith, by means of which great volumes of smoke, cinders, and gases are blown out of the mouth of the tunnel and into the dwelling-house of plaintiff. Plaintiff suffers therefore a peculiar, special,

and substantial injury which the public at large is not called upon to suffer.

Suppose Congress had directed that the mouth of this tunnel should be placed at some point in southwest Washington at least a half of a mile south of the Capitol Building and the company had located the tunnel at this point. Would the legislative sanction or authority thus restricted be of any different character than that granted to the railroad company in the Fifth Baptist Church case and would it avail to relieve the railroad company of liability? Should the fact that Congress, in the general interest of the public, has directed the erection of the tunnel at a given point carry with it immunity to the railroad company from suits for damages for special and particular injuries inflicted upon private property? The case here made out is in no way analogous to the incidental inconvenience which unavoidably follows the additional occupation of a street by the cars of a railroad with the noises and disturbances necessarily attending their use. It is a case of special, peculiar, and substantial damage not suffered by the public generally.

Aside from these considerations, which seem to us to be conclusive, where is the provision in the act *requiring* that the mouth of the tunnel be opened at this particular point so that all the smoke, which is driven from it by means of the fanning system, should be blown upon Richards' property? It is true that the plans for the work had to be approved and were approved by the Commissioners for the District of Columbia, but this approval of plans, as to manner of constructing the tunnel, etc., cannot be construed into a *direction by Congress* that the mouth of the tunnel be opened at this particular point.

This case should not be confused with those where abutting property owners along a railroad right of way or street suffer an incidental inconvenience and consequential damage *in common with all others along the right of way*. In

such cases, of course, the damages are *damnum absque injuria,* and the individual must suffer the inconvenience for the public good. It is from a failure to observe this obvious distinction that much confusion has arisen.

Third Assignment of Error.

The third assignment of error is as follows:

> "The court below erred in affirming the action of the trial court holding that the damage to plaintiff's property was not a taking without just compensation and in contravention of the Fifth Amendment to the Constitution of the United States."

This assignment of error presents a question upon which there is a great deal more doubt. It furnishes a much better opportunity for the defendant to argue its non-liability, and it was upon this point, principally, that the Court of Appeals rendered its opinion. But we do contend that there is sufficient evidence to show that there was a taking of the property within the meaning of the Constitution. We contend that the soot, smoke, gas, and cinders, driven in great volumes from the mouth of the tunnel nearly a mile along, over and upon the property of the plaintiff, was a physical invasion. Of course, if this did not constitute a physical invasion under the decisions of this court, we could not recover upon this theory, though this in no manner affects our right to recover for the maintenance of this private nuisance.

Pumpelly *vs.* Green Bay Canal Company, 13 Wall., 166, supports our position. There the plaintiff sought damages against the defendant for injury caused to his property by the backing of water so as to overflow his lands. This Court held that the backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other materials or artificial structure placed on lands, if done under statute authorizing

it for public benefit, is such a taking as, by the constitutional provisions, demands compensation. In the opinion the Court says:

> "The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision and that the damage is a *consequential* result of such use of a navigable stream as the Government had a right to for the improvement of its navigation.
>
> "It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.
>
> * * * * * * *
>
> "If these be correct statements of the limitation upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.
>
> * * * * * * *
>
> "We are not unaware of the numerous cases in the State courts in which the doctrine has been success-

fully invoked, that for consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by *superinduced additions of water, earth, sand or other material*, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further."

Upon the foregoing principles of law we respectfully submit that the Court of Appeals erred in sustaining the action of the trial court, and that its judgment should be reversed.

Respectfully submitted,

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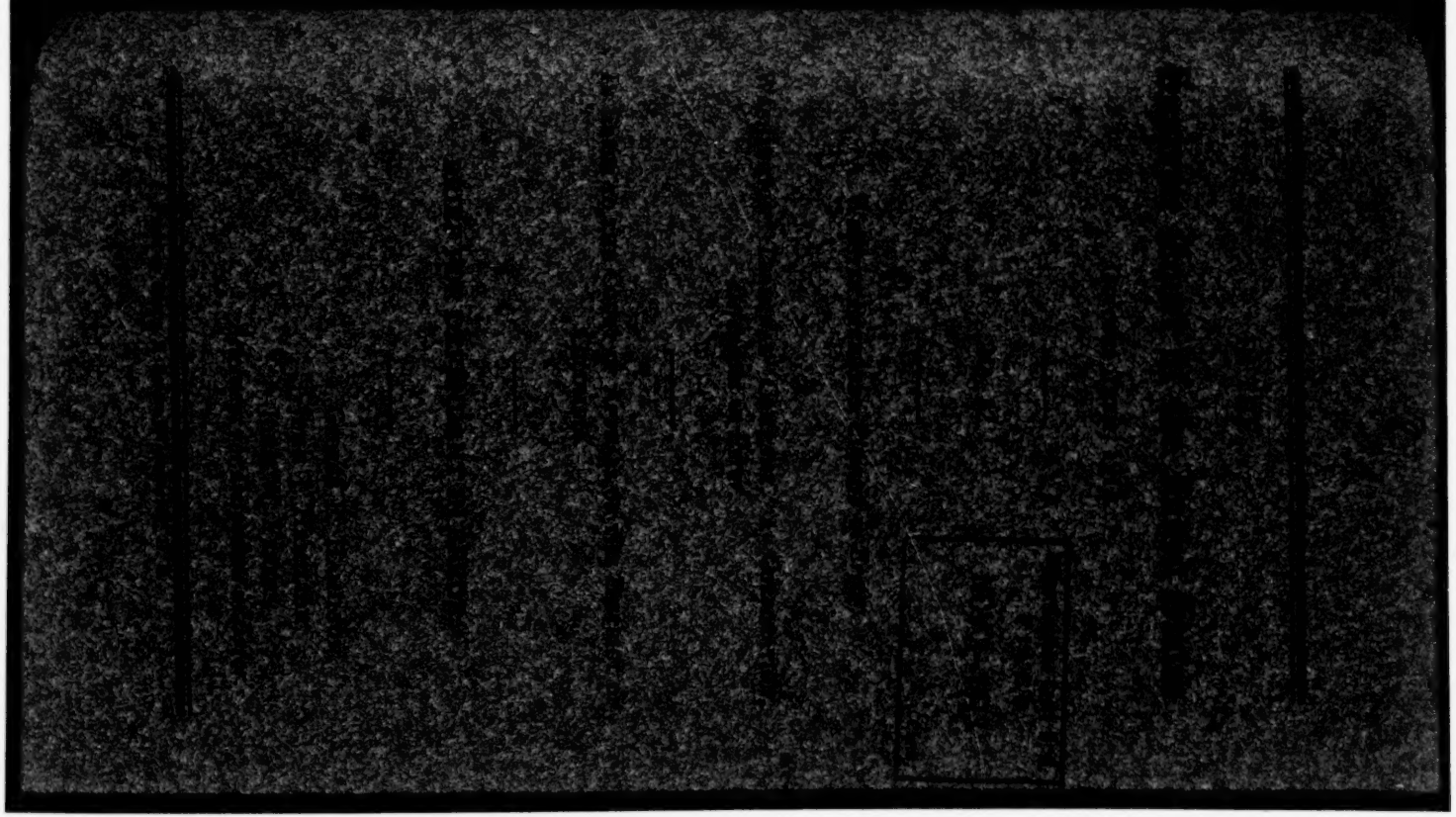

SUBJECT INDEX.

AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 52.

A. WEBSTER RICHARDS, *Plaintiff in Error,*

v.

WASHINGTON TERMINAL COMPANY, A CORPORATION, *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Being without opportunity to read brief of counsel for plaintiff in error, and to consider the Statement of this

cause therein presented, we make a brief statement of the questions involved herein.

Suit was brought by plaintiff in error (hereinafter called plaintiff), in the Supreme Court of the District of Columbia, to recover damages of defendant in error, Washington Terminal Company, a corporation (hereinafter termed the Company), and these damages being incident to the moving and passing of locomotive engines and trains of cars over defendant's right of way, and through a tunnel in the City of Washington. The tracks and tunnel were owned or controlled in operation by the Company.

There was no charge of negligence in the declaration as to construction or maintenance of the tracks or tunnel, or in the operation of the road and the trains thereon. The declaration charged injuries to dwelling house and furniture of plaintiff, and to the comfort and health of himself and family (Rec., pp. 1, 2, 3). The defendant company pleaded not guilty (Rec., p. 2).

The case coming on for trial, and after the introduction of certain testimony by plaintiff, it was agreed between counsel for plaintiff and counsel for the defendant company, with the consent of the court, that an agreed statement of facts should be made and taken as the evidence of plaintiff in the cause, and be substituted for and in place of the testimony offered by various witnesses on behalf of plaintiff (Rec., pp. 7, 8, 9). From this agreed statement the following facts appear:

The plaintiff, since 1901, had owned a three story brick and basement house, with lot, in the City of Washington, on the west side of New Jersey Avenue, Southeast, having a frontage on the Avenue of 20 feet and an average depth of 81 feet, being lot numbered 34 in Square 693. The property was situated about 114 feet from the south portal of the tunnel, and the nearest point of the rear end of

plaintiff's lot to the center of the Company's tracks south of the tunnel was about 90 feet.

Between the right of way of the Company and plaintiff's house were three lots, built upon, with a total frontage of about 60 feet.

The tracks south of the south portal of the tunnel, and the tunnel itself through which the trains complained of are operated, were constructed and owned in part by the Terminal Company and in part by the Philadelphia, Baltimore & Washington Railroad Company; that the movement of the trains is controlled by the Terminal Company; that these tracks and tunnel were located, constructed and are maintained under authority of acts of Congress of February 12, 1901, and February 28, 1903, and in accordance with plans and specifications approved according to the requirements of said acts, and permits issued by the Commissioners of the District of Columbia.

That from 1901 to 1907, the house was occupied by tenants, at a monthly rental of $30.50. From April, 1907, until January, 1908, the house remained vacant, plaintiff being unable to secure a tenant. That since January, 1908, plaintiff and family occupied the premises.

The road is a double track line at the point named, and some thirty passenger trains pass over the track in the course of each day. (Under the acts of Congress no freight trains can use these tracks, except under very extraordinary circumstances).

That plaintiff's property had been damaged by volumes of dense black or gray smoke, emitted from the trains passing; that gases, cinders and smoke were blown out of the tunnel and upon the premises of plaintiff; that the dwelling house had been damaged by the vibrations following the movement of the trains; that the property had depreciated in value $2500, and the furniture and personal

property belonging to plaintiff in the house had been damaged to the extent of $600.

This agreed statement closed with the following words:

> "That no claim is made by the plaintiff that said tunnel and said tracks in Square 693, and all trains operated therein and thereon, were constructed, operated or maintained in a negligent manner; and that said tunnel and said tracks were built upon property acquired by purchase or in condemnation proceedings, and that they were constructed under authority of the acts of Congress and permits issued by the Commissioners of the District of Columbia, as aforesaid."

Upon this agreed statement, which contained all the evidence offered by plaintiff in chief to go to the jury, counsel for defendant company requested the court to direct a verdict for the defendant. After full argument and consideration of the motion by the court, it was granted, and a verdict for defendant returned and judgment entered thereon (Rec., p. 5). (Opinion of court sustaining motion, Rec., pp. 9 to 13, incl.)

On appeal by plaintiff to the Court of Appeals of the District of Columbia, judgment was affirmed (Rec., pp. 16 to 19, incl.), 37 Appeals D. C. 289, and the cause is now before this court on writ of error.

QUESTION OF LAW INVOLVED.

The question of law involved in this case is clearly defined.

The location of the right of way occupied by the defendant company, a public service corporation, was fixed by law, and the defendant is occupying and operating it in a lawful manner, without negligence in either construction or operation.

There has been no physical taking of any portion of defendant's property, no physical invasion or practical ouster. The Congress has not enacted any legislation under which plaintiff is entitled to damages for the consequential and incidental injuries sustained.

The legal question, then, is whether there has been a taking of plaintiff's property within the meaning of the Fifth Amendment of the Constitution, and for which compensation must be made.

The Federal Congress, in furtherance of the public good, directs and requires the construction and operation of a railroad over and on a location and route definitely fixed, determined and declared by the Congress, with power conferred for the acquisition of the right of way by purchase or condemnation; and property not adjacent to, or bordering on, this right of way is injured by the operation of trains, and said operation being free from negligence.

Has there been such a taking of property as authorizes compensation, or are such injuries and damages incidental and consequential, for which there can be no recovery?

A CONSIDERATION OF THE ACTS OF CONGRESS UNDER WHICH THE COMPANY CONTROLS, OWNS OR OPERATES THE TRACKAGE IN QUESTION.

FIRST.

Under the provisions of the "Act providing for eliminating certain grade crossings of railroads in the District of Columbia, to require and authorize the construction of new terminals and tracks for the Baltimore and Ohio Railroad Company in the City of Washington, and for other purposes," approved February 12, 1901, 31 Statutes at Large, 774, the defendant Terminal Company was incorporated December 6, 1901, with the various duties, rights and

obligations imposed on it by said act, including the power to take, acquire and hold in fee simple all lands and property required for the terminals, stations, yards, railroad facilities and other works authorized by the act, either by purchase or by condemnation, as provided in sections 648 to 663, both inclusive, of the Revised Statutes relating to the District of Columbia.

Sections 651, to 655, both inclusive, provide for the acquisition of these railway lands by purchase from the owners, or by act of appropriation. If the latter be necessary, then under section 654 it becomes the duty of the Supreme Court of the District of Columbia, to "appoint by warrant three disinterested freeholders of the neighborhood on which the land lies, to appraise the damages which the owner of the land may sustain by such appropriation."

No part of the land of the plaintiff in error was appropriated.

SECOND.

Under an act entitled "An Act to provide for a union railroad station in the District of Columbia, and for other purposes" approved February 28, 1903, 32 Statutes at Large 909, the Philadelphia, Baltimore and Washington Railroad Company, or the defendant Terminal Company was authorized "to locate, construct, maintain and operate a double-track railroad" within the City of Washington, as follows:

> "commencing at a point on the railroad of said Philadelphia, Baltimore and Washington Railroad Company at or near the crossing of Second Street southwest, at the elevation of said railroad provided for in the said Act of Congress relating to the Baltimore and Potomac Railroad Company approved February twelfth, nineteen hundred and one; thence curving toward the north, crossing over Virginia avenue with

a clearance of fifteen feet above the present curb thereof, crossing over First street southwest and Delaware avenue southwest, at a point about forty feet north of the north house line of E street, with a clearance of not less than sixteen feet; thence curving to the northward, crossing over Canal street and South Capitol street with a clearance of not less than fourteen feet above the curbs thereof; *thence passing under the intersection of D street with New Jersey avenue,* C street southeast, and B street southeast at the intersection with First street; thence continuing under the west side of First street to near E street northeast; thence curving to the eastward, crossing under the proposed circle at Massachusetts avenue to a connection with the tracks in the proposed terminal station to be built on the north side of Massachusetts avenue hereinafter provided for; * * * * * "

The property of plaintiff is on New Jersey Avenue, about 114 feet south of the south portal of the tunnel, (which is at the intersection of D street with New Jersey Avenue), and is some 60 feet west of the Company's right of way.

ARGUMENT.

FIRST.

A.

The Congress, in Providing for the Acquisition of the Right of Way for Railroad Construction in Connection With the Abolition of Grade Crossings in the District of Columbia and the Building of a Union Station and Its Approaches, Provided Only for the Payment of Compensation to Those Whose Land Was Appropriated, and Made no Provision for Recovery of Damages by Those Who Suffered Injury Through the Proper Construction and Operation of the Road.

If Congress had desired to make provision for payment of compensation to land owners whose property was not actually taken or occupied, but who suffered injury and damage by reason of the construction and operation of the railroad, the act would have contained fit and appropriate language to make certain this right. This has been done by the Congress in other cases.

In *United States vs. Alexander*, 148 U. S., 186, the owner of a well on land near to, but not on, the line of the Washington Aqueduct, which well was destroyed in the construction of that work, recovered damages, but this recovery was based upon the express language of the act, which provided that any person who by reason of the taking of his land, *or by the construction of the works hereinafter directed to be constructed, should be directly injured in any property right*, could, within a year, file his petition in the Court of Claims, setting forth his right or title and the amount claimed by him as damages for the property taken *or injury sustained*. The Supreme Court, at page 191, says:

> "It is contended on behalf of the United States that the legislature intended to restrict the right to sue exclusively to the parties holding land within the limits of the survey, and that hence the Court of Claims erred in recognizing the claim for damages to lands not embraced in the survey. We are unable to adopt this view of the meaning of the statute.
>
> "On the contrary, we think the plain meaning and intent of the legislature were to provide for the case of those whose lands or property rights were directly injured by the construction of the work proposed to be done, as well as for the case of those injured by the taking of their lands. This seems to us so clear as to require no elucidation."

In *Northern Transportation Company of Ohio vs. City of Chicago,* 99 U. S., 635, the Court said:

> "A legislature may and often does authorize and even directs acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute."

In *High Bridge Lumber Co. vs. United States, et al.,* (Circuit Court of Appeals, Sixth Circuit, July 2, 1895), 69 Fed. Rep., 320, at page 326, the Court said:

> "We have already seen that, under the well-settled common law applicable to such cases, damages not directly consequent upon the 'taking,' but incident to or consequent upon the construction and operation of a public improvement in a prudent and skillful manner, are *damnum absque injuria, unless such injuries are to be compensated by the terms of the statute under which the work was prosecuted.*" (Italics ours).

As the Congress made no provision in its legislation, providing for the construction and operation of the Union Station and the tunnel and tracks necessary to the elimination of grade crossings in this city, for the payment of compensation to those suffering incidental injury and damage, it seems fair to assume a legislative purpose to limit payment to such damages as were directly connected with the acquisition—the taking—of the right of way itself.

B.

Many cases may be cited where under distinct provisions of State constitutions and legislation these incidental and consequential damages may be recovered. Originally nearly all of the State constitutions followed the language of the Federal instrument with regard to compensation to be paid for private property taken for public use. In the construction of this clause in both State and National Constitutions, the general rule was to limit the recovery to the value of the property actually taken or occupied, coupled frequently with damages for such incidental injuries as might affect the property of the owner immediately adjacent to that taken. A large number of the States have changed and broadened the language of their constitutions, so that now recovery may be had for the class of injuries being here considered.

The State of Pennsylvania, by its constitution adopted in 1873, required corporations invested with the privilege of taking private property for public use, to make just compensation for property *taken, injured* or *destroyed* by the construction or enlargement of their works.

In *Penn. R. R. Co. vs. Miller,* 132 U. S., at page 75, by reason of this provision of the constitution of Pennsylvania, damages were allowed to the owner of property abutting upon a street occupied by the railroad and injured by reason of cinders, smoke, dust and dirt incident to the operation of the railroad, and also because the free access to the land was impaired. Here, however, was a distinct legislative provision allowing recovery not only for the property taken, but for any property *injured* or destroyed by the construction of the road.

The State of Illinois, in 1870, adopted a new constitution which provided that "private property shall not be taken or *damaged* for public use without just compensation."

In the case of Chicago vs. Taylor, 125 U. S., 161, the Court called attention to the fact that up to the adoption of the constitution of 1870, there could be no recovery by an adjacent property holder on streets, the fee whereof was in the city, for the merely consequential damages resulting from the character of the improvements made in the streets, provided such improvements had the sanction of the legislature. Taylor had recovered a judgment for damages to certain realty owned by him, through the construction of a viaduct in the immediate vicinity of his property. His right to these damages was sustained, and the Court, at page 170, said:

> "It may be, as suggested by its counsel that the present constitution of Illinois, in regard to compensation to owners of private property 'damaged' for the public use, has proved a serious obstacle to municipal improvement. * * * * And it may, also, be, as is suggested, doubtful whether a constitutional convention could now be convened that would again incorporate in the organic law the existing provision in regard to indirect or consequential damage to private property, so far as the same is caused by public improvements. We dismiss these several suggestions with the single observation that they can be addressed more properly to the people of the State in support of a proposition to change their constitution."

In Texas the old constitutional provision has been changed to read as follows:

> "No person's property shall be taken, *damaged* or destroyed for or applied to a public use without adequate compensation being made unless by consent of such person."

By reason of this distinct constitutional provision, it was held in *Gainesville H. & W. R. R. Co. vs. Hall,* 78 Texas, 169, that a land owner whose property is injured by the construction of a railway and running trains thereon, is entitled to damages, although the railway be not upon his land, nor any of his property be taken.

In many other States similar constitutional provisions have led to similar judicial decisions, and when a case is cited holding that a railroad is responsible in damages for consequential injuries occasioned by the construction and operation of its road, it should be immediately determined whether the constitution of the State follows the language of the Federal Constitution, or has been broadened and widened so as to include classes of injury before suffered without right of legal redress.

SECOND.

There Has Been no Such Taking of the Property of Plaintiff in Error for Public Use as Requires Compensation to be Made to Him by Defendant in Error.

Proper consideration of this proposition leads to review of the decisions of this Court especially in point. We will begin with the case recognized as the extremest modification or qualification by this Court of the original doctrine that before there could be legal claim for the taking of private property for public use, there must have been an actual taking from the owner of some portion of his property—absolute conversion of property to the uses of the public—namely, the case of *Pumpelly vs. Green Bay Company,* 13 Wall., 166, decided in 1871.

The Green Bay and Mississippi Canal Company erected a dam across Fox River, in the State of Wisconsin. This river was the northern outlet of Lake Winnebago, and as a

result of the construction of the dam the waters of the lake overflowed all of the land of Pumpelly with such force and violence as to virtually destroy it. The trees and grass were torn up by the roots, deposits of sand placed upon it, and this condition had continued from the time of the completion of the dam in 1861 to the commencement of the suit in 1867.

The constitution of Wisconsin ordained that "the property of no person shall be taken for public use without just compensation therefor." The Canal Company contended that there was no *taking* of the land of Pumpelly within the meaning of the constitutional provision, and that the damage was a consequential result of such use of a navigable stream as the Government had a right to for the improvement of its navigation. The Supreme Court declined to accept this construction, and at pages 177, 178, said:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property, to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right un-

der the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

However, in this case, the language of the State constitution was being construed, and at pages 179, 180, the Court said, in referring to the decisions of the Supreme Court of Wisconsin:

> "In numerous cases of this kind under the Mill and Mill-dam Act of that State this question has arsien, and the right of the mill-owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the Court has often expressed its doubt whether the use under that act was a public one, within the meaning of the constitution, but it has never been doubted in any of those cases that it was such a *taking* as required compensation under the constitution. As it is the constitution of that State that we are called on to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us."

Furthermore, as appears on pages 167, 168, of the opinion, the act relating to mills and mill-dams contained this clause:

> "Any person whose land is overflowed, or otherwise injured by such dam, may obtain compensation therefor upon his complaint before the District Court for the county where the land, or any part thereof, lies, provided that no compensation shall be awarded for any damages sustained more than three years before the institution of the suit."

In 1878 the case of *Transportation Co. vs. Chicago*, 99 U. S., 635, was decided. The Transportation Company

brought suit against the City of Chicago to recover damages occurring to its property by reason of the construction of a tunnel under the Chicago River. The testimony offered showed, among other things, that during the construction of the tunnel and a coffer dam necessary to the building of same, the company was unable to land freight or passengers at its wharves and docks, and that because of the negligent and improper manner in which the work was done the warehouses were greatly damaged and injured, the walls cracking and settling, and in several places falling. The city offered testimony tending to prove that the work was carefully done, and that the obstructions complained of were unavoidable in the proper construction of the tunnel. The Court, denying the right of recovery, called attention to the fact that the present constitution of Illinois which ordained that private property shall not be taken *or damaged* for public use without just compensation, which was an extension of the common provision for the protection of private property, did not become effective until after the work of constructing the tunnel had been substantially completed, and at pages 641, 642, said:

> "The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of

such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly vs. Green Bay Company, 13 Wall., 166, and in Eaton vs. Boston, Concord & Montreal Railroad Co., 51 N. H., 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

In this opinion the Court, after referring to the opinion in Pumpelly vs. Green Bay Company being "the extremest qualification of the doctrine," immediately stated that in that case there was a physical invasion of the real estate of the private owner and a practical ouster of his possession, clearly differentiating the conditions upon which that opinion was based from the conditions existing in the case then at the Bar of the Court.

In 1894 the opinion in *Marchant vs. Penn. R. R. Co.*, 153 U. S., at page 380, was handed down. The plaintiff Marchant alleged in his declaration that by the erection and maintenance of the elevated railroad of the Pennsylvania Company, and the continuous passage of passenger and freight cars thereon, driven by steam locomotives, he was injured in the possession, use and enjoyment of his property; that his dwelling and business house were rendered unfit for habitation, and greatly depreciated in value. The plaintiff's property was situated on the north side of

Filbert Street, in Philadelphia, while the railroad was constructed on property that it had acquired, abutting on the south side of Filbert Street, but not within the street itself. Filbert Street was 51 feet wide. The trial resulted in a verdict and judgment for the plaintiff in the sum of $4,980.00. The Supreme Court of Pennsylvania reversed, holding that the plaintiff had no legal cause of action, and the case came on writ of error to this Court. The Court, at page 389, says:

> "Conceding, for the sake of the argument, that the facts are as alleged by the plaintiff in error, we are unable to see any merit in the contention that the Supreme Court of Pennsylvania, in distinguishing between the case of those who, like Duncan, were shut off from access to and use of the street by the construction *thereon* of the elevated railroad, and the case of those who suffered, not from the construction of the railroad on the street on which their property abutted, but from the injuries consequential on the operation of the railroad, as situated on defendant's own property, thereby deprived the plaintiff of the equal protection of the laws. The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude them from the use of their accustomed highway, and the other class suffered damages which were consequential on the use by the defendant company of their franchise on their own property."

In this case being now heard the railroad and tunnel were constructed under the direction of Congress, constructed at the exact location selected by the Congress and on property acquired by condemnation or purchase. No portion of the property of Richards was taken, and in no way is he excluded from access to his property through

the use of any accustomed highway. The damages suffered by him are absolutely consequential on the use without negligence of rights conferred under the franchises granted by the Congress.

In 1897, the case of *Gibson vs. United States*, 166 U. S., 269, was decided. This suit was brought in the Court of Claims, the charge being that the plaintiff Gibson owned a tract of land of about twenty acres, situated on an island in the Ohio River, nine miles below the City of Pittsburgh. That it was in a high state of cultivation, well improved, with houses and barns, and the ground was used for market garden purposes, strawberries, raspberries, potatoes, melons, etc., being cultivated and shipped to the City of Pittsburgh. That by reason of the construction of a dike in the Ohio River, Gibson was denied egress and ingress to and from her property, and during the greater part of the shipping season could not use the landing on her property for the shipment of her products. That the land had decreased in value from $600 per acre to $152 per acre. That the dike itself did not come into physical contact with claimant's land, and no water was thrown back on her land. At page 275 the Court said:

> "The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power.
>
> "The applicable principle is expounded in Transportation Co. vs. Chicago, 99 U. S., 635."

and the Court then quotes from that opinion the language heretofore cited in this brief.

In 1903 *United States vs. Lynah,* 188 U. S., 445, was decided. In this case, by reason of the construction of certain dams in the Savannah River, water was thrown back upon a valuable rice plantation of Lynah, and its absolute destruction followed. At page 469 the Court said:

> "It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog."

Again, at pages 470, 471:

> "It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done, it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner."

So, in this Lynah case, there was an absolute destruction of the property, a permanent physical invasion of it by the water thrown back upon it, and the Court held that the entire value of the property must be paid because of this absolute taking, and that when that was done the government became the proprietor, invested with the fee.

The difference between that case and the one at bar is apparent without discussion. But in the Lynah case a dissenting opinion was filed by Mr. Justice White, with Mr. Chief Justice Fuller, and Mr. Justice Harlan concurring. At page 484 Mr. Justice White said:

> "If damage, by the loss of drainage, into the river at mean low tide of land so situated was caused by the lawful exercise by the United States of its power to improve navigation it was *damnum absque injuria*, and redress must be sought at the hands of Congress and cannot be judicially afforded by a ruling that a damage so resulting constitutes a taking of the property by the United States and creates an implied contract to pay the value of the property. Such a doctrine is directly—as I see it—in conflict with the decisions of this Court in Gibson vs. United States, 166 U. S., 269, and Scranton vs. Wheeler, 179 U. S., 141. *The far-reaching consequence of the doctrine now announced cannot be overestimated.*"

Especial attention is directed to the case of *Bedford vs. United States*, 192 U. S., 217, decided in 1904. The lands of Bedford and the other appellants, lying on the Mississippi River, were injured by an overflow as the result of certain work done upon the banks of the river. At pages 224, 225, the Court said:

> "The Constitution provides that private property shall not be taken without just compensation, *but a distinction has been made between damage and taking*, and that distinction must be observed in applying the constitutional provision. An excellent illustration is found in Gibson vs. United States, 166 U. S., 269. The distinction is there instructively explained, and other cases need not be cited. It is, however, necessary to refer to United States vs. Lynah, 188 U. S., 445,

as it is especially relied upon by appellants. The facts are stated in the following excerpt from the opinion:

> " 'It appears from the fifth finding, as amended, that a large portion of the land flooded was in its natural condition between high-water mark, and low-water mark, and was subject to overflow as the water was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. From this it is contended that the only result of the raising of the level of the river by the government works was to take away the possibility of drainage. But findings nine and ten show that, both by seepage and percolation through the embankment and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation about eighteen inches, that it is impossible to remove this overflow of water and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken.'

"The question was asked: 'Does this amount to a taking?' To which it was replied: 'The case of Pumpelly vs. Green Bay Co., 13 Wall., 166, answers this question in the affirmative.' And further: 'The Green Bay Company, as authorized by statute, constructed a dam across Fox River, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land.' In both cases, therefore, it was said that there was an actual invasion and appropriation of land as distinguished

> from consequential damage. In the case at bar the damage was strictly consequential."

In *United States vs. Grizzard*, 219 U. S., 180, the Court said (page 183):

> "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted."

But in the case at bar, as there was no actual physical taking of any part of plaintiff's land, there can be no consideration of damage coming to the remainder because of the uses to which the part appropriated were devoted.

A consideration of these decisions leads, we think, to the conclusion that before compensation can be legally claimed or legally allowed by a court in a case like this, there must be an actual taking or a practical destruction of a portion of plaintiff's property by some physical invasion of it, and not the mere coming of injury and damage to property removed from the right of way, and no portion of which was taken, and which injury and damage are consequential and incidental on the use by the defendant of a franchise granted, and this use accompanied neither by negligence nor fault in operation or construction.

THIRD.

State Decisions Holding Unless There be Specific Legislation or Constitutional Provision Providing for Recovery of Damages for Consequential or Incidental Injuries in a Case Like This, no Such Recovery Can be Allowed.

Where a railroad is constructed and operated in a lawful and orderly manner, without negligence, within the rights granted by legislative authority, and under legislative sanction, it is exempt from liability for injuries necessarily resulting from such legitimate use of the powers conferred and performance of the duties required, unless there be specific legislation or constitutional provision providing recovery of damages under such conditions.

No legislative authority for the recovery of consequential or incidental injuries can be claimed in this case, and having cited Federal decisions bearing on the central question at bar, we now respectfully direct attention to a few of the most striking and recent State decisions supporting the proposition of law above stated, and these decisions being in conformity with the utterances of this Court in Transportation Co. vs. Chicago, 99 U. S., at page 640:

> "A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. *In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute.*"

A

In Beseman vs. Penn. R. R. Co., 50 N. J. L., 235 (New Jersey Supreme Court), affirmed on appeal by the Court of Error and Appeals without opinion in 52 N. J. L., 221, the plaintiff, who was the owner of certain property in Jersey City, sued the defendant for damages growing out of the erection by the defendant of an elevated track some ten feet in the rear of plaintiff's houses, the claim being that the use of the track, passage of locomotive and cars, and the transportation of cattle and other freight, rendered the houses of the plaintiff unfit for habitation. The defendant's plea in substance set up that by force of its franchise derived from the public grant it built its road and ran its trains carrying merchandise and freight near to the lands of the plaintiff, doing the plaintiff no more damage than that which necessarily results from the transaction of such acts and business. In other words, that it was not responsible for unavoidable and incidental damage to the plaintiff. The Court, at page 237, said:

> "If it (plaintiff's case) should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitance of its use, is an actionable nuisance, with respect to plaintiff's property, so it must be as to all other property in its vicinity. * * * * The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are widespreading, impairing in a sensible degree, some of the usual conditions upon which depend the full enjoyment of property in the neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make these companies, touching such

land owners, general tort feasors; their tracks run for miles through the cities of the State, and every land owner on each side of the track would be entitled to his action; and so in the less populated districts, each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility. Nor is this susceptibility to be sued on all sides the only or even the worst consequence of the theory in question, for if these rights of action exist, it follows, necessarily, that each of the persons in whom they are vested can prevent the continuance of the wrong out of which such rights of action arise. If this plaintiff should recover two or three verdicts against the defendant because of the damage that is inseparable from the running of its trains, there is plainly no ground on which the chancellor could refuse to enjoin a continuance of the nuisance. * * * * In short, the plaintiff's claim involves the assertion that he can put a stop to the business of the defendant at the point in question."

The Court held that the company was not responsible for the incidental damages occasioned to plaintiff's land, it appearing from the plea that the road was being run in all respects with care and skill.

In *Twenty-second Corporation of Church of Jesus Christ of Latter Day Saints vs. Oregon Short Line Railroad,* Utah Supreme Court, decided in 1909, 23 Lawyers Reports Annotated, New Series, page 860, the Church brought its action to recover damages to its church property, caused by the operation of the railroad's trains. In denying recovery, the Court, at page 866, said:

"But it is contended: That, although respondent may not recover damages under the damage clause of the Constitution, it may, nevertheless, recover for any

interference or annoyance which is caused by what is termed a 'private' as contradistinguished from a 'public' nuisance; that neither the State nor the city could legally authorize the appellant to create a private nuisance and permit interference with respondent's rights with impunity. That neither the State nor the city could grant anyone the right to create or maintain a private nuisance with impunity no doubt is sound, and is conceded to be the law. The question, however, is: Does the operation of a railroad by passing of trains, whether few or many, when operated with ordinary care, constitute either a public or a private nuisance? Can the noises that emanate from moving trains be eliminated, without preventing the trains from running at all? Moreover, do not such noises affect all who are similarly situated along the line of the railroad? If not in the same degree, do they not affect all to some extent? If this be so, how can it be said that, in a legal sense, such noises constitute a nuisance, either public or private? The Court of Appeals of New York, in a comparatively recent case, namely, Bennett vs. Long Island R. Co., 181 N. Y., 431, in passing upon this point, uses the following language: 'The rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around the curves, the emission of smoke, soot, and cinders, all of which accompany the operation of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense; but, as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by the legislative authority which created the corporation, and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent.' "

These additional State cases support the contention of defendant in error as made.

Hatch vs. Vt. Central R. R. Co., 25 Vt., 49.
Taylor vs. B. & O. R. R. Co., 33 W. Va., 39.
Spencer vs. R. R. Co., 23 W. Va., 427.
Dunsmore vs. Central Iowa Ry Co., 72 Iowa, 182.
Boothby vs. Androscoggin & Kennebec R. R. Co., 51 Maine, 318.
Kansas N. & D. Ry. Co. vs. Cuykendall, 42 Kan., 234.
Briesen vs. Long Island R. R. Co., 31 Hun., 112.
Friedman vs. N. Y. & H. R. R. Co., 85 N. Y. Sup., 404.
Atchison, T. & S. F. R. R. Co., vs. Armstrong, 1 L. R. A., N. S., 113.

Throughout the decisions there is full consideration given to the distinction existing between the rights of persons whose property has been in part condemned and taken for railroad uses, and the remainder of this same property injured, or depreciated in value by the construction and operation of the road and the rights of persons owning property lying in close proximity to the railway line, but none of whose property has been taken.

B.

THE FIFTH BAPTIST CHURCH CASE.

Baltimore and Potomac Railroad Company vs. Fifth Baptist Church, 108 U. S., 317, is so frequently cited by courts and counsel in the decision and argument of cases involving questions of law and fact akin to the matters of law and fact involved in this case, that it will be segregated and considered separately. Careful reading of this decision, and careful consideration of the facts stated in the opinion, facts constituting the basis of the conclusions reached by the Court, lead us to rely on this opinion with

confidence, and to cite it as authority for appellee. The fault, the negligence, the wrong of the railroad company which brought liability in that case, was its lack of care, its lack of regard for existing conditions and the rights of others in the location, voluntarily chosen by it, for its engine-house, repair shop and tracks. The act of Congress under which the road entered the District of Columbia, conferred upon it the authority "to exercise the same powers, rights and privileges in the construction of a road in the District of Columbia * * * * which it could exercise under its charter in the construction of a road in Maryland * * * *" and by its charter "it was empowered to make and construct all works whatever which might 'be necessary and expedient' in order to the proper completion and maintenance of the road."

The right of selection as to location of its tracks and necessary engine-house, and repair shop buildings, was with the railroad company, but there remained the duty it owed to citizens of the District and their property.

The Fifth Baptist Church was erected in 1869. In 1872 the railroad company, under the powers above set forth, erected upon a lot of ground immediately adjoining the church property an engine-house and machine shop, where a number of locomotives and steam engines were housed and their fires made, and to and from which the engines were propelled, and in which they were coaled, watered, repaired and otherwise used. The church authorities advised the railroad company before the erection of these works that if they were put there, they would be a nuisance and ruinous to plaintiff's property. Notwithstanding this protest, the construction of these buildings was begun and completed.

Furthermore, the engine-house was built upon the line of the railroad's premises, within 5½ feet of the church

edifice, constructed with sixteen smoke stacks, lower in height than the windows of the main room of the church; and further, although the railroad company was only authorized to lay its track along Virginia Avenue, it constructed a side track from that avenue to its work shops, crossing a part of D Street, and the sidewalks on D Street, at a distance of about 100 feet from the door of the church. That the locomotives were allowed to stand at the entrance of its premises, with their cow-catchers protruding several feet beyond the enclosure, sometimes standing across the sidewalk along which two-thirds of the congregation passed in going to and from the church, and that access to the church was obstructed and rendered dangerous, and on several occasions members of the congregation barely escaped being run over by the sudden starting of the locomotives without note or warning.

Frequently the church services were virtually stopped by the blowing off of steam, and the hammering and other noises in the work shops, and the rumbling of the engines interfered seriously with the services. That smoke, cinders and dust and offensive odors came through the windows, annoyed the congregation, and injured the interior of the building and its furniture. That the church property was virtually ruined for church purposes, and that its value had depreciated fully fifty per cent.

In its opinion, at page 331, the Court said:

> "In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. In-

deed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city.

"Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property."

And we now invite especial attention to this language of the Court on the same page:

"Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation.

"But the case at bar is not of that nature."

The case now at the bar of this Court is virtually of that nature. The Congress directed this road to be constructed at a fixed, given place, with authority to secure its right of way by purchase or condemnation. There was no choice of location for its tracks, its tunnel or its terminal station. The road was constructed without negligence at the points and places designated. No freight trains were allowed to pass over it. The agreed statement shows there has been no negligence in connection with construction or operation. The injuries complained of by the appellant are those inci-

dental inconveniences which unavoidably follow the occupation of a right of way by railway tracks, and the passage thereover of trains of cars.

And can we not, in view of this opinion, and the broad variance in the facts then before the Court, and now before the Court, say that "whatever consequential annoyance may necessarily follow from the running of the cars on the road with reasonable care is *damnum absque injuria.*"

In Atchison, Topeka and Santa Fe Railway Company vs. Armstrong, 1 Lawyers Reports Annotated, New Series, 113, counsel for plaintiff below had relied upon the Fifth Baptist Church case. In its opinion the Court, speaking through Mr. Justice Greene, and all of the Justices concurring, said:

> "Thus it will be observed that the Court held that the railroad company exceeded its authority in building its shops where it did, and on that ground permitted the plaintiff to recover."

Again, in Twenty-second Corporation vs. Oregon Short Line Railroad, 23 L. R. A., N. S., 860, the court, in discussing the Fifth Baptist Church case, which was the leading case cited by counsel for plaintiff, said:

> "The Court, in substance, held that the railroad company had no right to erect its shops at such a place; that such shops could and ought to be erected and maintained at some other place, where their maintenance would result in the least possible annoyance to others, and not under the very windows of a church."

There was no option, no power of selection in this defendant as to where its road should be constructed. The Congress had determined that absolutely.

CONCLUSION.

In view of the decisions of this court, we submit there has been no taking, no physical ouster, no such "actual invasion and appropriation of land as distinguished from consequential damage" as entitle the plaintiff to compensation.

The decisions of both State and Federal courts, construing the language of the Fifth Amendment of the Federal Constitution, and similar language in State Constitutions, were well known to the Congress before it enacted the laws of 1901 and 1903, referred to herein. The Congress had full knowledge of the change in State Constitutions and laws, whereby incidental and consequential damages were made recoverable. It had knowledge of its legislation considered in the Alexander case, *supra*, and if the Congress had intended to place the added burden of responsibility for incidental and consequential damages upon the railroad and Terminal Company, it would have so provided in clear and distinct language.

The Congress recognized that it placed upon the railroads the enormous cost attendant upon the elimination of grade crossings in this city, the construction of the tunnel, and huge viaducts and a magnificent terminal union station because the public good and accommodation demanded it, not that the railroads desired it or sought it.

As said by Chief Justice Clabaugh (Rec., p. 11):

> "It seems here is a case in which the railroad company has no choice. Unless they wanted to surrender their charter rights, they were compelled to obey the mandate of Congress. Congress said to the company, 'You shall do this' and there is no question but that they must either do it or surrender their charter rights from the necessity of the case."

In discussing the acts of Congress of 1901 and 1903, *supra,* the court, in Millard vs. Roberts, 25 D. C. App., 225, referred to the very work we are considering as being "of great magnitude, greater perhaps than their own needs require, but which Congress deems to be demanded for the best interests of the National Capital and by the public at large."

And when these acts are fully considered, the fullness of detail in legislation, the completeness of direction and liability, it seems almost unthinkable that the Congress had placed upon the roads and this defendant such a limitless, continuous burden as would follow upon approval of the contention of plaintiff in error, and this without a word or sentence so declaring.

As indicated in opinions already quoted, the plaintiff's claim involves the assertion that he can put a stop to the business of the defendant at the point in question, and thus defeat the purpose and intent of Federal legislation.

Was it not the purpose and intent of Congress that its selection of location, its positive orders, its sanction should stand for all time as the proper and legal response to any demands that might be presented for incidental and consequential damages arising from the construction and operation of these tracks and tunnel, provided always the roads and the Terminal Company, in obeying the mandates of Congress, constructed and operated with due care and without negligence.

We respectfully ask that the judgment below be affirmed.

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